

IN THE COURT OF APPEALS
AT KNOXVILLE

FILED
February 9, 2000
Cecil Crowson, Jr.
Appellate Court Clerk

WANDA SHADWICK,)
) SCOTT COUNTY CHANCERY COURT
)
) Plaintiff-Appellee)
) E1999- 02607-COA-R3-CV
) formally 03A01-9903-CH-00119
)
) v.)
) HON. BILLY JOE WHITE,
) CHANCELLOR
)
)
) SHIRLEY YOUNG and BETTY TOMPKINS,)
)
) Defendants)
)
) and)
)
) F.H. SHOEMAKER DISTRIBUTORS, INC.)
)
) Intervening Petitioner-)
) Appellant)
) AFFIRMED AND REMANDED

SIDNEY R. SEALS OF ONEIDA FOR APPELLANT

JOHNNY V. DUNAWAY OF LAFOLLETTE FOR APPELLEE

O P I N I O N

Goddard, P.J.

The essence of this appeal is whether a judgment creditor of an estate should be permitted to intervene in a marital/familial matter.

I. FACTS

Ms. Wanda Shadwick and Kenneth Lee Phillips lived together for 21 years. During that time they spent time in multiple states, including Georgia and Alabama, where they established a common law marriage under the laws of those states. Kenneth Lee Phillips died July 10, 1997. Ms. Shadwick filed suit to have the common law marriage between her and Mr. Phillips be recognized by the State of Tennessee. The defendants, Shirley Young and Betty Tompkins are the sisters, heirs-at-law, and next-of-kin of Mr. Phillips.

The intervening petitioner-appellant, F. H. Shoemaker Distributors, Inc., is a judgment creditor of the estate of Mr. Phillips. Shoemaker moved to intervene in this matter averring that Ms. Shadwick was attempting to establish a common law marriage between herself and Mr. Phillips in order to obtain the widow's years support and widow's entitlement to exempt

property.¹ Shoemaker alleged that would reduce the Estate of Kenneth Phillips and would seriously affect Shoemaker's ability to collect the debt owed to it by the Estate.

II. PROCEEDINGS IN AND HOLDINGS OF THE TRIAL COURT

In order to adequately address the issues presented by the appellant, we set forth the chronological history of this case.

This suit was filed on December 18, 1998. On January 13, 1999, a creditor of the estate, Shoemaker filed a motion to intervene with an accompanying petition. Ms. Shadwick filed a response to the motion on January 19, 1999, averring that Shoemaker had no standing to intervene and contest a marital and/or familial relationship.

On January 22, 1999, Ms. Shadwick filed a motion for default judgment.

¹Ms. Shadwick, is the sole beneficiary under the Last Will and Testament of Mr. Phillips. The Will was admitted to probate by the Probate Court for Scott County, Tennessee, on August 4, 1997. On July 22, 1998, Shoemaker obtained a judgment in the Probate Court against the estate in the amount of \$25,079.54. In order to satisfy the debt, Shoemaker levied upon and conducted a Sheriff's sale of certain real and personal property of the estate. Subsequent to the sale, Ms. Shadwick filed a \$500,000 lawsuit against Shoemaker alleging wrongful execution and abuse of process in the execution, levy and sale of the personal and real property.

A hearing on the motion to intervene was held by the trial court on February 11, 1999. The trial court denied the motion of Shoemaker to intervene. The Chancellor based his decision upon the rulings in Church of Christ v. McDonald, 180 Tenn. 86, 171 S.W.2d 817 (1943) and Madewell v. United States, 84 F.Supp. 329 (E.D. Tenn. 1949). The Chancellor held that a judgment creditor should not be allowed to intervene in a cause of action to establish a marital/familial relationship. The bench ruling was confirmed by an order entered on March 2, 1999.

The Chancellor's order denying Shoemaker the right to intervene recognized that Shoemaker had filed a claim which was reduced to judgment on July 22, 1998 and that execution of the judgment subsequently issued and a sale of both personal and real property was conducted. The Chancellor further stated that a suit was filed by Ms. Shadwick against Shoemaker in Chancery Court for Scott County seeking money damages of \$500,000 based upon several errors made in the execution and sale of property pursuant to the judgment entered on July 22, 1998, in Scott County Probate Court.

On February 17, 1999, Shoemaker moved for a stay pending appeal. Ms. Shadwick filed a response to the motion on February

23. Shoemaker, then, presented a motion for an interlocutory appeal on March 1. The Chancellor did not act upon the motion.

A hearing was held on the default judgment on March 9, 1999. By order entered on March 11, the Chancery Court granted a default judgment against Shirley Young and Betty Tompkins and declared that Wanda Shadwick established a common law marriage that is recognized by the states of Georgia and Alabama and the common law marriage established by Kenneth Lee Phillips and Ms. Shadwick in those states should be recognized and given full faith and credit in the State of Tennessee. The Court held that Ms. Shadwick was the wife or is the widow of Kenneth Lee Phillips and entitled to all rights of inheritance under the laws of the State of Tennessee in the event of his death.

On March 19, 1999, Shoemaker filed a motion to set aside the default judgment. Ms. Shadwick filed a response on March 22, 1999, averring that Shoemaker lacked standing to make such a motion, which was never acted upon by the trial court. This appeal was filed on March 23, 1999.

III. ISSUES

There are two main issues presented for our review. We restate them as whether the Chancellor should have permitted Shoemaker to intervene in this matter and whether a default judgment was improperly obtained by Ms. Shadwick, while Shoemaker's Motion to Stay proceedings was pending in the trial court?

IV. LAW AND DISCUSSION

Our review of the findings of fact made by the trial Court is *de novo* upon the record of the trial Court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Tennessee Rules of Appellate Procedure, Rule 13(d); Campbell v. Florida Steel Corp., 919 S.W.2d 26 (Tenn. 1996). Where there is no conflict in the evidence or the inference to be drawn therefrom as to any material fact, the question on appeal is one of law, and the scope of review is *de novo* with no presumption of correctness accompanying the trial court's conclusions of law. Enochs v. Nerren, 949 S.W.2d 686 (Tenn. Ct. App. 1996).

We note that this is not a final judgment from which an appeal as of right may be taken since no disposition has been

made as to Shoemaker's motion to set aside the default judgment.² Since, however, the disposition of this appeal will in all likelihood dispose of the case, we choose to treat this appeal as an interlocutory one.

In support of its position that it should be permitted to intervene, Shoemaker cites only one case, Ballard v. Herzke, 924 S.W.2d 652 (Tenn. 1996). Ballard deals with a blanket protective order, sealing discovery documents produced in the suit by residents against owners and operators of a life care center. The blanket protective order was modified to permit disclosure of most documents and the petitioning newspaper was allowed to intervene by the Chancellor. On appeal, the Supreme Court held that: (1) permissive intervention was properly granted to the newspaper; (2) modification of the protective order to permit disclosure of the previously sealed documents was not an abuse of the Chancellor's discretion; and (3) the Public Records Act did not apply to documents that remained subject to modified protective order. We do not find that case to be in point as to the issues in this appeal.

²In Bemis Co. v. Hines, 585 S.W.2d 574 (Tenn. 1979), a motion entitled "Motion to Set Aside Decree and Restore Cause to Docket" was filed within 30 days after judgment, it was considered as a motion for new trial. Likewise, here we consider the motion to set aside the default judgment to be a motion for a new trial.

T. R. C. P. 24 sets forth the following guides to intervention.

Rule 24.01 Intervention as of Right

Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties; or (3) by stipulation of all the parties.

Permissive intervention is governed by Tennessee Rules of Civil Procedure 24.02, which provides in pertinent part as follows:

Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

Shoemaker has asserted no statutory right to intervene in this matter. Neither have the parties stipulated that Shoemaker

has the right to intervene. So, we are left with questions as to whether Shoemaker should be permitted to intervene because (1) Shoemaker's claim and the main action have a question of law or fact in common, or because (2) Shoemaker claims an interest relating to the property or transaction which is the subject of the action and Shoemaker is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest, unless the its interest is adequately represented by existing parties.

We can readily dispose of the first. We agree with the appellee that Shoemaker should not be allowed to intervene because there is no showing of common questions of fact and law raising in the two cases. One is distinctly a monetary claim against the deceased's estate. There are adequate means available to Shoemaker to assert its claim. We find no common fact or law question to be involved with the determination of a common-law marriage between the deceased and Ms. Shadwick and the claim against the estate. We find that the commonality of the two actions as similar as oil and water, which are not compatible.

A diligent search produces no Tennessee case law directly in point. The brief filed by Ms. Shadwick's counsel has been of assistance to the court and we appreciate his efforts. We find particularly helpful the case of Madewell v. United States,³ 84 F. Supp. 329 (E.D. Tenn. 1949), in which Chief Judge Taylor examined Tennessee case law as to the validity of marriage, both statutory and common law, and the state's policy as to permitting inquiry into the validity of a marriage.

The public policy of Tennessee and, this Court believes, the public policy of the civilized world, is to sustain marriages, not to upset them. For over a hundred years the public policy of Tennessee has denied to third parties the privilege of inquiring into the validity of the marriages of her citizens. Even those who come within the circle of permissible interest are narrowly restricted in the manner and range of their inquiries. . . .Tennessee has taken a strong stand against unnecessary inquiry.

Madewell, 84 F. Supp. at 332.

Chief Judge Taylor further stated that a marriage, whether of common law or statutory form, may not be attacked by third

³Mary Madewell commenced suit to recover benefits under an insurance policy on her husband. She was the named beneficiary in the policy. She was disallowed benefits by the Veterans Administration on the ground that she was not the legal widow of the insured.

parties in self-interest,⁴ citing the following cases in support thereof. McKinney v. Clarke, 31 Tenn. 321, 58 Am. Dec. 59 (1852); Rogers v. Park's Lessees, 23 Tenn. 480 (1844); Bohlen-Huse Coal & Ice Co. v. McDaniel, 148 Tenn. 628, 257 S. W. 848 (1923); Brewer v. Griggs, 10 Tenn. App. 378, certiorari denied, December 21, 1929; Cole v. Parton, 172 Tenn. 8, 108 S.W.2d 884 (1937). Shoemaker's attempt to intervene in the common law action is unequivocally in its self interest and therefor, under Madewell, not to be permitted.

Moreover, additional support demonstrating that Shoemaker should not be permitted to intervene is supplied by Lillard v. Tolliver, 154 Tenn. 304, 285 S.W. 576 (Tenn. 1926). Ms. Shadwick declares that a creditor of an estate is not the real party in interest because of a lack of standing in regard to a will contest and further analogizes that to an action concerning a common-law marriage. Lillard v. Tolliver sets forth the liberal criteria for parties to participate in a will contest as being

All persons who have any possible interest in the estate, either as heirs, as legatees or devisees, under one or more wills, may be said to be proper parties in such proceedings.

⁴Madewell, 84 F. Supp. at 333.

Lillard v. Tolliver, 285 S. W. at 578. Creditors of the estate are not listed as a person who has any possible interest in the estate. Further support of no standing of creditors to raise questions concerning the validity of a will is provided by Church of Christ v. McDonald, 180 Tenn. 86, 171 S.W.2d 817 (Tenn. 1943), upon which the Chancellor based his decision. In Church of Christ two creditors of an estate, who were neither heirs nor distributees of the estate, could not raise questions concerning the validity of the will at issue and the right of the church to take under the will.⁵

We also find Wiley v. Bridgman, 38 Tenn. 68 (Tenn. 1858) to be helpful. Wiley held that where complainants had a complete remedy at law, to ask relief in equity, was not only useless, but expensive and mischievous. In Wiley, the creditors to an estate already had a judgment in the Circuit Court, with an execution and levy upon the land. All they had to do was to sell it under the writ. Instead, the sheriff was made a party defendant to the bill and restrained by an injunction from making the sale. A decree to sell was asked in Chancery court. The court found that the proceeding could not be justified by the fact that executions in favor of other creditors had been levied upon the same land.

⁵See Church of Christ, 171 S.W.2d at 820.

The sheriff having the money produced by the sale in his hands could readily apply it, according to the priorities of the writs, or if he had doubts how to distribute it, the court would advise him. In the same manner, we do find no justification for Shoemaker to interfere in any decision by the trial court relating to the issue of a common law marriage between Ms. Shadwick and Mr. Phillips.

We find the trial court correctly declined to permit Shoemaker to intervene in this suit. Shoemaker has no standing to challenge the common law marriage of Ms. Shadwick and Mr. Phillips. The issues relating to its claim against Mr. Phillips' estate and the appropriateness of its actions as to the sale of the personalty and real property upon which it executed can be adequately addressed in the Probate Court and the suit filed in Scott County Chancery Court.

As to a default judgment being entered recognizing Ms. Shadwick as being the common-law wife of the deceased, we note that there was no transcript of evidence or statement of the evidence entered. In the absence of any transcript or statement of the evidence being entered, it is presumed that there was evidence to support the ruling of the trial court. Scarborough v.

Scarborough, 752 S.W.2d 94 (Tenn. App. 1988). Furthermore, in the absence of a transcript or statement of the evidence, we must conclusively presume that every fact admissible under the pleadings was found or should have been found favorable to the appellee. J. C. Bradford & Co. v. Martin Const. Co., 576 S.W.2d 586 (Tenn. 1979; In Re Rockwell, 673 S.W.2d 512 (Tenn. Ct. App. 1983). Here, we must conclude that the Chancellor had sufficient evidence before him to find that a default judgment should be granted in this matter.

We also note that the Chancellor made the determination as to Shoemaker's right to intervene before he granted the default judgment. There was no need for the Chancellor to delay acting upon the motion for default judgment, while Shoemaker's Motion to Stay proceedings was pending in the trial court. It would unnecessarily retard the proceedings which should be determined as expeditiously as possible.

V. CONCLUSION

The trial court is affirmed in toto. This matter is remanded to the trial court for such further proceedings as may be necessary consistent with this opinion and collection of costs

below. Costs of appeal are adjudged against Shoemaker and its surety.

Houston M. Goddard, P.J.

CONCUR:

Herschel P. Franks, J.

D. Michael Swiney, J.